No. 14471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY GEERS,

Appellees.

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

CHARLEY GEERS,

Appellee.

Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

MAURY, LARSEN & HUNT,
808 Tishman Building,
3460 Wilshire Boulevard,
Los Angeles 5, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

No. 14471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,
Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY GEERS,
Appellees.

THE QUAKER OATS COMPANY, a corporation,
Appellant,

vs.

CHARLEY GEERS,
Appellee.

Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

[Rule 18(2)(b).]

Jurisdiction is based on diversity of citizenship. The plaintiff is a New Jersey corporation [Complaint, Par. 1, R. 3]; the defendants are citizens of California. [Answers, R. 12, 18; Findings, R. 34, Par. 5; R. 38, Pars. 1, 2, 8; Pre-trial Stipulation, R. 20.] Property valued at $9,000.00 plus, or bad checks totaling $6,600.00 plus is involved.

The statutory provisions which sustain jurisdiction are 18 U. S. C. 1332. (Diversity of citizenship and amount involved.)

Abstract of Case.

The Quaker Oats Co., plaintiff and appellant, in August, 1952, held two recorded chattel mortgages to secure feed bill upon flocks of turkeys being grown by Ohlson and wife, and by McVickers and wife, respectively, in Riverside County, Southern District of California, Central Division.

Defendants Geers and Couch (Couch died prior to trial) were "hucksters" who engaged to purchase certain turkeys from Ohlson and McVickers, giving checks therefor at the scales and taking the turkeys away. Said checks were, all but one, made out jointly to the grower and to The Quaker Oats Co. The hucksters thereupon transported the turkeys to Los Angeles, outside of Riverside County, California, within a period of less than thirty days, and sold said turkeys to the defendants McKibben, Carter, and Lewis. McKibben and Carter were partners in the turkey processing business; Lewis operated another processing business, separate from McKibben and Carter.

The checks given by Geers and Couch were dishonored by the bank upon which drawn and have never been made good. The total dishonored checks amount to $6,604.45. [Exs. 1, 2, 3, 4, and 5 in Evid.]

The questions involved are:

(1) Whether plaintiff's chattel mortgages gave constructive notice to the hucksters and processors of plaintiff's right to possession.

(2) Whether the passing of bad checks by the hucksters to the growers passed title to the turkeys from the growers to the hucksters, *i.e.,* whether the bad checks,

never honored, *per se* constituted *payment* of the purchase price.

(3) Whether usage and custom is sufficient, when it was not relied upon by the processor defendants, to vary the terms of recorded chattel mortgages by parol evidence of such usage between grower, mortgagee, and huckster only.

(4) *Caveat emptor* should apply to the processors.

Specifications of Error.

1. The Trial Court erred in making and entering two separate (and inconsistent) sets of Findings of Fact and Conclusions of Law. [R. 31-35, incl.; 37-42, incl.]

2. The Trial Court erred in making and entering two separate (and inconsistent) judgments. [R. 36-37, 42-43.]

3. The Trial Court erred in holding that sales of turkeys had been made and were complete prior to the honoring of the checks given for payment by the bank upon which drawn. [R. 33, wherein the Findings state: "All checks given by Couch and/or Geers *in payment* for turkeys involved herein; R. 34, Finding No. 5; R. 34-35, Conclusion No. 2; R. 35, Conclusion No. 4; R. 40, Finding No. 7; R. 40, Finding No. 8; R. 41, Finding No. 9; R. 41, Finding No. 10.]

4. The Trial Court erred in holding that the purchasers of the turkeys were not charged with constructive notice of the entire contents of the recorded chattel mortgages. [R. 22, Memorandum of Opinion of the Trial Judge states as follows: "A chattel mortgage was obtained from each of the turkey growers which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mort-

gage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded." The chattel mortgages involved, *i.e.,* Exs. 14 and 15, duly recorded, each provide that mortgagee shall have immediate right of possession ". . . or if grower shall sell or assign or attempt to sell or assign any part of the mortgaged property without the prior written consent of the mortgagee . . ." R. 39, Finding No. 4; R. 32, Finding No. 1; R. 39-40, Finding No. 5; R. 40, Finding No. 6.]

5. The Trial Court erred in holding that usage and custom not relied upon by the processors, prevailed over written, recorded chattel mortgages. [R. 33, Finding No. 4; R. 41, Finding No. 11.]

6. The Trial Court erred, in the "McKibben-Carter-Lewis Findings" (hereinafter called the MCL Findings), in failing to note, consider, and given weight to the fact, in the MCL finding numbered 1, that the recorded Chattel Mortgages themselves contained clauses notifying the world that no sales by growers would be valid without appellant's written consent. [R. 22, Memorandum of Opinion of the Trial Judge states as follows: "A chattel mortgage was obtained from each of the turkey growers which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded." The chattel mortgages involved, *i.e.,* Exs. 14 and 15, duly recorded,

each provide that mortgagee shall have immediate right of possession ". . . if grower shall sell or assign or attempt to sell or assign any part of the mortgaged property without the prior written consent of the mortgagee . . ." R. 39, Finding No. 4; R. 32, Finding No. 1; R. 39-40, Finding No. 5; R. 40, Finding No. 6.]

7. The Trial Court erred in MCL Finding No. 3, in finding, contrary to the evidence, that Couch (now deceased) personally made all the purchases of turkeys from the growers. [R. 38, Finding No. 2; R. 32, Finding No. 3.]

8. The Trial Court erred in entering MCL Finding No. 3 in that it is contrary to the evidence and confuses money in bank with uncollected deposits. [R. 33, Finding No. 3.]

9. The Trial Court erred in finding that defendant Charley Geers had no notice of the terms of the Chattel Mortgages. [Exs. 14 and 15 in Evid.; R. 39, Finding No. 5: "Quaker Oats did not notify . . . Charley Geers that they did not have the right to sell turkeys without first obtaining plaintiff's written consent; . . ." R. 40, Finding No. 6: ". . . and at no time notified . . . the defendant Charley Geers that they did not have the right to sell turkeys without first obtaining plaintiff's written consent."]

10. The Trial Court erred in entering Finding No. 7 of the Findings of Fact and Conclusions of Law, hereinafter called the "Geers Findings," as the same is unsupported by the evidence and confuses money in the bank with uncollected deposits. [R. 40, Finding No. 7; Exs. 7 and 9; Ex. A of Deft. Geers.]

11. The Trial Court erred in making and entering the Conclusions of Law proposed by defendant Geers. [The evidence conclusively shows that Geers gave the bad checks; Geers signed them; Geers took some birds to market; Geers received the purchase price for the birds from the processors and put at least some of the money into the mutual bank account and has never made the checks good. R. 48-91, 270-273; Exs. 1, 2, 3, 4, 5, 6, 7; Geers Ex. A; Exs. 8, 9, 10-A, 10-B, 10-C, 10-D, 11, 14, 15, 16, 17, 18, 19, 21, 22; R. 67.]

12. The Trial Court erred in making Finding No. 11 of the Geers Findings, as same is unsupported by and is contrary to the evidence. [R. 65-66, 77-78, 154-155, 175; Testimony of Lewis, R. 209: "They wait until the check has cleared, I mean they don't take a check as currency anyhow, whether it is in the feed business or anywhere else. I mean the check has to be good. Q. The check is not considered payment unless it is good? A. Not in any line that I have ever seen." R. 222-223, 236-237, 241, 246, 266.]

13. The Trial Court erred in making Finding No. 12 of the Geers Findings, as the same is contrary to the evidence. [R. 41, Finding No. 12. (This is a blanket finding that each and all of the allegations numbered VI, VII, and VIII are untrue. These paragraphs are found at R. 5 and are properly numbered in Arabic 6, 7, and 8. The evidence is replete that the chattel mortgages were not discharged and were in full force and effect during August of 1952) and that, insofar as Geers is concerned, he certainly wrongfully removed from Riverside County 1500 live turkeys, *i.e.,* 30,000 pounds, the subject of said mortgage, from Riverside County to Los Angeles County, and converted them to his own use. The reasonable value

is shown by the purchase price on the various invoices from 30¢ to 32¢ a pound, or at least $9,000.00.]

14. The Trial Court erred in making MCL Finding No. 5 [R. 34] as it is contrary to the evidence, and unsupported thereby. This is unsupported by the evidence because there was no written or other agreement whatsoever that the checks were to be treated as cash; on the contrary, all evidence is that the checks are "not considered payment unless they were good." [R. 65-66, 77-78, 154-155, 175, 209, 222-223, 236-237, 241, 266.] Not one word of evidence in the entire Record will support this finding that "all parties treated the same as cash transactions."

15. The Trial Court erred in entering MCL Finding No. 8, as it is contrary to and unsupported by the evidence. [This is a blanket finding that each and all of the allegations numbered VI, VII and VIII, are untrue. These paragraphs are found at R. 5 and are properly numbered in Arabic 6, 7, and 8. The evidence is replete that the chattel mortgages were not discharged and were in full force and effect during August of 1952.]

16. The Trial Court erred in entering MCL Finding No. 9, as it is a blanket finding and is unsupported by and is contrary to the evidence. [R. 13-14.]

17. The Trial Court erred in holding that the lien of the Chattel Mortgage was not valid against the defendants McKibben, Carter, and Lewis. [R. 35, Conclusion No. 3.]

18. The Trial Court erred in holding that the lien of the Chattel Mortgage was not valid against the defendant Charley Geers. [R. 42, Conclusion No. 1.]

19. The Trial Court erred in deciding the case in favor of the defendants, each respectively, and against the plaintiff.

CONCISE ARGUMENT OF THE CASE.

(1) Technical Points.

We do not consider technical points generally to be important. We prefer to have cases decided entirely upon the merits.

The Memorandum of Opinion is designated in the Record [R. 21-31, incl.] to illustrate, *inter alia,* that realistic orientation of the Lower Court to the actual position of the parties was lacking. In the first place [R. 23], the Lower Court, in the Memorandum of Opinion, stated quite clearly that "Prior to the commencement of this action *Geers* was killed in an automobile accident and in consequence was not named as a party defendant." This in spite of the fact that it was Couch who was killed, while Geers personally had appeared in court as a defendant, appearing *in propria persona* [R. 18-20, incl.]; and as a witness before the Court [R. 48-91, 270-273] he testified in the flesh. This conceivably could be overlooked as a mere inadvertence but for the fact that *in context* throughout the entire Memorandum of Opinion the Court mentions both John J. Couch and Charley Geers and distinguishes between them by saying [R. 23]: "Defendant Couch's main duty being to contact the farmers, buy the turkeys, and transport them to Los Angeles, where they were turned over to Geers for sale."

The memorandum is negated by the subsequent Findings, Conclusions, and Judgment which were interposed by the defendant Geers himself [R. 37-43] and signed by the judge without correcting or in any wise altering the Memorandum of Opinion.

In this same manner, two sets of Findings of Fact, two sets of Conclusions of Law, and two Judgments have been entered.

This produces inconsistency and confusion, and in the main, we submit the better practice would be to enter (in a case such as this) only one set of Findings and Conclusions, and only one judgment. Both judgments are, however, appealed from in their entirety. [R. 44, 45.]

(2) The Effect of the Recorded Chattel Mortgages.

The Trial Judge failed to recognize and give any effect to the clause in the chattel mortgages (both *duly recorded*) containing the plaintiff's right of possession if sold without plaintiff's written consent. At R. 22 the Court, in its Memorandum, states:

> "A chattel mortgage was obtained from each of the turkey growers which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded."

Throughout the entire Memorandum of Opinion, throughout both series of Findings of Fact, throughout both sets of Conclusions, and throughout both Judgments, it is apparent that the trial judge tacitly adverted from the fact that the chattel mortgages contained a proviso that,

> ". . . or if grower shall sell or assign any part of the mortgaged property without the prior written consent of the mortgagees, . . . mortgagees may take possession of the mortgaged property."

These recorded documents the Court leaps lightly over and brushes aside in both sets of Findings, as follows (1) [R. 32]:

> "At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained plaintiff's written consent. *These contracts were never recorded,"*

and (2) [R. 33]:

> "It is true that, nothwithstanding the written *unrecorded* contracts between plaintiff and growers, it was the custom of plaintiff to allow its growers to sell their turkeys,"

and [R. 38-38]:

> "That these mortgages were executed as security for poults and feed furnished by plaintiff to Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marion T. Ohlson.
>
> "4. That at the time of the execution of the chattel mortgage an additional contract was entered into between Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marion T. Ohlson by which Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marion T. Ohlson agreed not to sell any of the turkeys without written consent of plaintiff; that this written contract was not recorded."

We urge the law to be that duly recorded chattel mortgages, in California, give constructive notice to the world of *all* of their contents.

Sections 2957 to 2978, California Civil Code, govern chattel mortgages.

This California law has been outlined and explained by Justice Lemmon in *England v. Moore Equipment Co.*, 8 Fed. Supp. 532 (aff'd 187 F. 2d 1019 by this Court), as follows:

> "At common law delivery to and possession by the mortgagee of a mortgaged chattel was required. This has become changed by statute in California and recordation has been substituted for delivery and possession. Ruggles v. Cannedy, 127 Cal. 290, 297, 53 P. 911, 59 P. 827, 46 L. R. A. 371. The authority for the creation of a chattel mortgage in this state derives its source from the statutory enactments and all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions. Hopper v. Keys, 152 Cal. 488, 92 P. 1017.
>
> "Section 3440 of the Civil Code of the State of California was designed to prevent secret liens upon and secret transfers of personal property and requires in order to effect a transfer of personal property that there be an immediate delivery and continued change in possession, without which the transfer is void as to creditors and as to purchasers and encumbrancers in good faith. Mortgages allowed by law are exempted therefrom. Mortgages not executed and recorded as provided by law are subject to the penalty provided under Section 3440. Ruggles v. Cannedy, *supra*.
>
> "There is presented to the Court the question as to whether or not the mortgage, though valid in its inception, was no longer in existence at the time of the private sale above mentioned.
>
> "The conditions which must be compelled with in the creation of a valid lien upon personal property

are found in Section 2957 of the Civil Code. Among other requirements enumerated therein are those for recording of mortgages of property, such as here involved, in the offices of the recorder of the county where the property is located, or the county where the mortgagor resides at the time the mortgage is executed and 'in the county to which such property is thereafter removed.'

"Section 2965 of the Civil Code provides that if mortgaged personal property, such as the property here under consideration, is removed from the county in which it is situated, the lien or mortgage shall not be effected by such removal for a period of 30 days after such removal, but that, after the expiration of the 30 days, the property is exempted from the operation of the mortgage, except as between the parties thereto, until either:

"1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

"2. The mortgagee takes possession of the property as prescribed in the next section.

"The next section, Section 2966, provides: 'If the mortgagor voluntarily removes or permits the removal of the mortgaged property * * * from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.' "

See also:

Swift v. Higgins, 72 F. 2d 791.

The cases from the California courts hold in accord:

Bank of California v. McCoy, 23 Cal. App. 2d 192, 72 P. 2d 923.

In the case of *Elliott v. Hudson,* 18 Cal. App. 642 at 646, 142 Pac. 103, 108, we find the following:

> "There seems to be no provision of the code expressly making the recordation of a chattel mortgage constructive notice of its contents. Constructive notice is that 'which is imputed by law' * * * and 'Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiries he might have learned the fact.' * * * Section 2963, Civil Code, *supra,* gives the recordation of a mortgage of personal property like effect with that of grants of real property, and without doubt persons about to purchase personal property which is the subject of a chattel mortgage would be charged with constructive notice of a recorded mortgage of such property if it were not at the time part of realty."

Analogous in many respects to the case at bar is the case of *Hammels v. Sentous,* 151 Cal. 520, 91 Pac. 327. This was an action to recover damages for conversion of personal property—as is this present action. Plaintiff was the owner of a promissory note, *secured by a chattel mortgage* upon 41 heifers and 169 hogs in San Diego County. The mortgage was duly acknowledged and recorded. On January 4, 1905, without the knowledge or consent of the plaintiff Coe, the mortgagor removed 86 of the hogs to Los Angeles, and on the next day he sold and delivered the hogs to the defendants who, within ten days thereafter, slaughtered the hogs and sold and disposed of the meat. The defendants had no *actual* notice of plaintiff's mortgage and bought the hogs in the belief that Coe was the owner as he represented himself to be. No question was raised as to the validity of the mortgage.

The Court held that the removal from San Diego to Los Angeles County did not invalidate the lien and that it lasted for a period of thirty days after the removal under the statute. The Court stated "for, if the mortgage was suspended by the removal and was not in force when the defendants purchased the hogs, a good title passed by such purchase and nothing was added to it by the fact that plaintiff did not subsequently record his mortgage in Los Angeles County. On the other hand, if the mortgage was a valid and subsisting lien for thirty days after removal, the defendants were guilty of conversion in appropriating the property and destroying it during such period (*Wilson v. Prouty,* 70 Cal. 196, 11 Pac. 608) The plaintiff had a complete cause of action when such conversion was committed and did not lose this cause of action by failing at a later date to comply with the useless form of recording a mortgage of property no longer in existence.

While in this case no question of re-recording arises, the case of *Hammels v. Sentous,* is cited as authority that conversion occurred by the defendants Geers' and Couch's taking the birds in exchange for bad checks and thereafter "reselling" to the defendants McKibben, Carter and Lewis. And that McKibben, Carter and Lewis each were guilty of additional conversion by appropriating the property and destroying it in Los Angeles when the checks given by Couch and Geers were valueless and dishonored.

A similar case with respect to a fruit crop tortiously removed is *Pacific Fruit Exchange v. F. C. Booth Co.,* 103 Cal. App. 54, 283 Pac. 944, which cites *Hammels v. Sentous,* and holds that "One who purchases such property within such period in the County to which it

has been removed is guilty of conversion in appropriating the same."

The doctrine by comity extends to chattel mortgages executed in other States where the property is found in California. See *Motors Investment Co. v. Breslauer,* 64 Cal. App. 230, 221 Pac. 700, where it is stated:

> "The principle underlying it may be analogized to that upon which the owner of property stolen from him, or taken or transported to another State, may follow the thief into the latter State and reclaim or take possession of the pilfered goods or chattel, wherever found. A State may, it is true, refuse to recognize the Rule of Comity in such cases but, should it do so, it would become a party to every such fraudulent transaction. It is not going too far to say, and to hold, that it is preferable and more desirable that an innocent purchaser, or encumbrancer, of personal property brought into a State under such circumstances as those characterizing the transaction with which we are here concerned should suffer loss, *which possibly his own improvidence or want of diligence has brought to him,* than that the state should assume and maintain an attitude towards such transaction which would necessarily stigmatize it as an accessory after the fact to the fraud inhering therein." (Italics ours.)

We, therefore, respectfully here submit that until the moments of "sale" (so-called herein only for purposes of discussion) from grower to huckster, the chattel mortgages were valid, subsisting liens upon the birds. And that when "sold" for bad checks and transported to Los Angeles County, the plaintiff, both under the law and under the terms of the recorded chattel mortgages, was entitled to possession.

(3) Bad Checks Are Not Payment.

We believe we demonstrate herein the error of the lower Court in its Findings of Fact, Conclusions of Law, and Judgment where it held that bad checks are legal payment and that title passed by virtue of these "sales" from grower to huckster:

In the MCL Conclusions [R. 35] the Court concludes:

> "Therefore the sales to defendants did not constitute a conversion of said birds, and *title to said birds passed* to defendants free and clear of any claims of plaintiff." (Italics ours.)

Likewise, in MCL Finding No. 5 [R. 35], the Court finds:

> "It is true that, although the transaction involved herein were carried on by payment by check, all parties treated the same as cash transactions."

In the Geers Findings, the Court found [R. 41]:

> "That the custom in the turkey industry in August of 1952 was to pay farmers by check payable to the farmers and to the feed company, and that the custom of the turkey business was that these checks would be accepted and were treated as cash."

We assert, we believe advisedly, that *there is not one word of testimony, not one bit of evidence, in the entire record* to sustain the Findings above quoted. We assert, too, that there is not one authority in all of the decided appellate cases, either Federal or State, so construing California law. The Conclusion of Law of the learned Trial Judge is, we submit, entirely erroneous. Title did NOT pass by virtue of the bad checks, and Couch and Geers never owned the birds.

A case very close factually to the case at bar is *Charles H. Clark v. Hamilton Diamond Company,* 209 Cal. 1, 284 Pac. 915. The subject was a diamond ring. The action was for possession. Plaintiff sold the ring to one Harry Justice who "fraudulently gave a worthless check in payment therefor." Justice traded the ring to a Mr. Dye as a payment on a second-hand automobile. Dye deposited the ring for sale with one Allen, retail jeweler. Allen placed the ring in the possession of one Friedman, who went about from store to store buying and selling jewelry. Friedman *sold* the ring to the defendant, who purchased it *without knowledge* of the transaction between plaintiff and Harry Justice. Immediately upon receipt of the check from Justice, the plaintiff deposited it in due course of business for collection and it was returned marked "Not sufficient funds." Immediately thereupon plaintiff brought the action and obtained possession. The findings indicate that sale of the ring to Justice was for cash. The plaintiff did not waive immediate cash payment and gave no *indicia* or muniment of title to anyone when the sale was made. In obtaining the ring, Cohen, the purchaser, did not rely upon any evidence of title in the grantor.

Cohen appealed contending that he was a bona fide purchaser of the ring without knowledge of the defect of title.

The Court stated as follows:

> "That the sale of the ring by plaintiff to Justice was in effect a sale for cash as distinguished from a sale on credit, payment to be made, as is customary in similar transactions, by check. As it was not agreed that the check was to be received as absolute payment, the delivery of the ring to Justice was also

conditional and *the check being dishonored upon due presentation, title to the ring remained in plaintiff."*

(*South San Francisco Packing and Provision Company v. Jacobsen,* 183 Cal. 131, 190 Pac. 628.) It seems to be very definitely settled by that case and the authorities there cited that as between the parties, upon the check being dishonored, the seller is clearly entitled to resume possession of the property. As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done. In this case the plaintiff gave to Justice, the original purchaser, no indicia of title other than the possession of the property. He followed the due course of business in attempting to secure payment of the check and took immediate steps to recover the ring upon learning that the check was worthless. Appellant has not made it appear in fact, nor does he claim he was injured by any delay on plaintiff's part. It is very clear from the findings that in this case the plaintiff did not transfer the possession of the ring to Justice with a power to dispose of it; therefore, Section 1442 of the Civil Code does not apply and any executed sale by Justice, or those purporting to claim under him, does not transfer plaintiff's title to them. (*Pacific Acceptance Corporation v. Bank of Italy,* 59 Cal. App. 76, 209 Pac. 1024.)

> "There was no other indicia of ownership than mere possession. That was not enough. There must have been some act or conduct on the part of the real owner whereby the parties selling were clothed with apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the innocent third persons dealing on the faith of such appearances."

With the difference, we submit, that here the chattel mortgagee, instead of the title holder, is prosecuting the rights under its lien, which the owner could just as readily prosecute (and of which the owners will receive the eventual benefit, if any) the two cases are virtually identical in chain of events.

Another case very similar in fact is found in *Mitchell v. Porter,* 123 Cal. App. 329, 11 P. 2d 58.

In that case the property was an automobile. Mitchell purchased it and received a certificate of registration. He became ill and went to Arizona for his health. On leaving he appointed his father his agent to sell the car. The father advertised the car and one C. E. Marks appeared and negotiated to purchase the car. Marks produced a check and tendered it in payment. The father stated that before he turned over the automobile or papers that he must be given time to ascertain if the check was good. Marks consented but asked permission to drive the automobile to the insurance office wherein he proposed to have new insurance issued in his own name and promised that he would return as soon as Mitchell obtained information about the check. To obtain insurance, Mark asked to have possession of the old policies and "the pink slip"; hence these papers were endorsed to him. The true owner, John F. Mitchell, had signed the pink slip on the last line on the face of it. When his father delivered the pink slip to Marks, the blanks on the reverse side for the signatures of registered and legal owners had not been filled. No writing appeared on those lines when the father delivered the pink slip to Marks. No bill of sale, or anything purporting to be so, was delivered to Marks by the father. Marks was never seen again by plaintiff or the father. Marks appeared at the place of

business of the defendant Porter in Salinas and sold the car to Porter, signing "John Mitchell" three times on the "pink slip." He also signed a bill of sale. The check was dishonored; in fact, the maker had no account at the bank. Porter then sought to register the transfer of the automobile. A demand for possession was made by plaintiff. Litigation followed. The automobile was awarded to plaintiff, the true owner.

We have cited the foregoing as factual illustrations of analogous cases and their disposition in the courts. The lower court here has considered and based its decision upon such consideration, that the transactions between the growers and the hucksters in each instance constituted a valid sale. Therein lies, we believe, the basic error. A sale in law envisions the payment of a purchase price. We believe this is axiomatic.

But here no purchase price was paid.

The evidence is incontrovertible that the checks [Exs. 1, 2, 3 and 5] totaling $6,604.45, all were dishonored and have never been made good. [Exs. 1, 2, 3, 4 and 5 in evidence; R. 40, Testimony of Geers, Finding No. 7; R. 33, M. C. L., Finding No. 3.]

The rule of law in this respect is stated generally in 70 Corpus Juris Secundum, page 233, as follows:

"§24—Checks. a. In general
b. Agreement or consent of creditor
c. Negotiation or deposit
d. Diligence and laches

"a. *In General*

"The delivery to, or acceptance by, the creditor of the debtor's check, as distinguished from the actual

payment of the check, is not absolute payment of the obligation for which the check is given in the absence of any agreement or consent to receive it as payment, or any laches or lack of diligence on the part of the creditor, or negotiation by the check by him.

"The delivery to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, in the absence of any agreement or consent to receive it as payment, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him, as discussed *infra* subdivisions b—d of this section. In such case, the original debt is not paid or discharged unless, and until, the check itself is actually paid on due presentment, or, it is sometimes stated, until it is honored or accepted by the drawee; and, where the check is not paid on presentment, the creditor may treat it as a nullity, return it, and recover on the original debt, or, at his option, sue on the check.

"On the other hand, where a check delivered to a creditor, although without any agreement or consent on his part to receive it as absolute payment, is in fact paid in due course, the debt is discharged *pro tanto,* as of the time at which the check was received; but a payment other than in due course does not extinguish the debt. A check is accordingly often referred to as conditional payment. the condition being its collectibility from the bank on which it is drawn. On fulfillment of the condition by payment of the check on presentation, the payment, which was previously conditional, becomes absolute.

"While it has been said that, in order for a check to have the effect of payment, the drawer must have sufficient funds in the bank to pay the check or it must appear that the check would be paid on presentment in the usual course of business, it has been held that a check which is not paid or converted into cash or its equivalent is not payment of the obligation for which it is given, notwithstanding the drawer has sufficient funds on deposit with the bank to meet the check and the bank is solvent, and that, if the check is paid, it is immaterial that the bank is insolvent."

The rule in California is the same.

In *DeBerry v. Cavalier,* 113 Cal. App. 30, 35, it is stated as follows:

". . . In 21 Ruling Case Law 37, section 34, it is said: 'In the absence of any agreement to the contrary money is the sole medium of payment.' At page 60, section 59, of the last-cited authority, it is further said: 'With the exception of a few jurisdictions the authorities are unanimous in supporting the rule that the giving of a bank check by a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt.' "

In *Swan v. Smith,* 102 Cal. App. 541, 543, the rule is stated to this effect:

" 'The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. . . . The general rule above stated does not require that in order to constitute the giving of a note or check a

payment there shall be express words or writing agreeing that the instrument shall be absolute payment. The circumstances and the conduct of the parties taken together may show an understanding that the paper is taken in satisfaction of the debt.'"

In the case of *Westberg v. Whittiken,* 101 Cal. App. 204, 281 Pac. 509, the subject is discussed:

"The next contention of the appellants is to the effect that the taking of the trade acceptances issued by the DeLuxe Building Company, constituted a payment. All there is in the record upon which this argument can be based is the simple indorsement of the word 'paid' appearing upon the account rendered for the materials furnished and labor performed. There does not appear to have been any agreement or understanding that the trade acceptances in and of themselves should constitute payment. Under such circumstances the general rule relating to payments as set forth in 48 C. J., page 610, prevails. The rule is there stated as follows: 'The rule obtaining in most jurisdictions is that, in the absence of agreement or consent to receive it, as such, a draft or bill of exchange, although accepted by the drawee, or a promissory note of the debtor, or his acceptance of a draft or bill of exchange drawn upon him does not, in itself, constitute payment or amount to a discharge of the debt, although it may postpone the right of action thereon until the maturity of the paper, but if such paper, delivered to a creditor, is thereafter honored or paid, the debt is discharged *pro tanto* as of the date of such collection or payment, and accordingly a bill or note is often designated *prima facie* or conditional payment.' The authorities supporting this statement of the law cited in Corpus Juris, *supra,* are simply legion. The rule is stated

in different language, but to the same effect, in 20 California Jurisprudence, page 920: 'The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. The rule is based upon the obvious ground that nothing is to be considered as payment in fact but that which is in truth such unless something else is expressly agreed to be received in its place.' It is further there stated that if the note or check is not paid, action may be had upon the original debt. And as further stated in the same volume, pages 925 and 926, the marking of the account as paid does not prevent the court inquiring into and ascertaining the true facts, and if the checks or notes or bills of exchange are dishonored, the indorsement of the word 'paid' on the original statement of account is immaterial. The following cases show that the rule announced in Corpus Juris and California Jurisprudence is followed in the State of California: Ellison v. Henion, 183 Cal. 171 [11 A. L. R. 444, 190 Pac. 793]; South S. F. Packing etc. Co. v. Jacobsen, 183 Cal. 131 [190 Pac. 628]."

Now here, the defendant processors have [perhaps] pleaded in their answers that there was a special agreement for the acceptance of the check by the growers and the mortgagee in payment [R. 13-14; 19-20]. The Court made no findings that there was such a specific agreement but

"all parties treated the same as cash transactions." [R. 34] and

"All checks given by Couch and/or Geers in payment for turkeys . . ." [R. 33, 41] and,

"That the custom in the turkey business was that the checks would be accepted and be treated as cash."

However, the lower Court *nowhere* found that there was any *agreement* either between grower or huckster, or between huckster and mortgagee, that these unpaid dishonored checks were to be accepted as payment. It could hardly do this because on the contrary, we find the record replete with evidence that there never was any such agreement in respect thereto, we submit the following excerpts:

(1) [R. 65-66]: Testimony of Geers:

"Q. (By Mr. Maury): Did he ever tell you Ohlson or McVickers or the Quaker Oats Company would accept bad checks in payment? A. I don't believe we went into that.

Q. Didn't discuss that? A. No.

Q. Didn't discuss payment at all, did you? A. I don't remember exactly whether we did or not, sir, I think basically you have to deal with the farmer, anyway.

Q. Tell us what you remember of what happened. A. When?

Q. As well as you can remember. Was anything said by you or Brooks respecting payment?

Q. You think he mentioned that they were paid by check? A. I think he mentioned that they were paid by check? Okay, I am assuming. I am thinking to the best of my knowledge. You said, 'the best you can remember.'

Q. I want the best you can remember. A. I can say I don't remember then. [R. 23.]

Q. You don't remember? A. No.

Q. You don't remember anything Mr. Brooks said about payment, is that right? A. I don't remember.

Q. You don't remember? A. That's right.

Q. I am going to ask you, was anything said about payment that you remember? A. I don't recall of even discussing payment with him."

(2) [R. 67] Testimony of Geers:

"Q. (By Mr. Maury): Have you ever made any of these checks which you signed good? A. I think you have one that was cleared.

Q. I am talking about ones that are in evidence before you. A. No, sir.

Q. Exhibits 1, 2, 3, and 5. A. No, sir.

Q. You knew they were all dishonored at the bank, did [25] you not? A. I did not know it until after I had quit Couch.

Q. You haven't paid anything on account, have you? A. No sir."

(3) [R. 77-78] Testimony of Geers:

"The Witness: There is one instance when I didn't deposit a check. The check was in the amount of $400. I believe it was from Mr. McKibben. The reason for that was I have a friend in the Citizens Bank at Riverside, and John wrote me a check for $400.00. I took the check in, and even though I didn't have an account there, this fellow is assistant cashier in the bank, so he put an O. K. on it, and I went over to the teller and he O.K.'d and he gave me the cash, and some time later he called me up, and it bounced high as a kite, and I had to scrape up $400 to make it good. I think Mack owed us some money, and I came down and his girl wrote a check for $400, and I think you will find that during the period there."

(4) [R. 175] Testimony of McKibben:

"Q. In fact, you didn't discuss any lien on the birds at [149] all, did you? A. No sir.

Q. Or any mode of payment by Mr. Couch or Geers for their receipt of the birds? A. No, I don't believe we discussed it."

(5) [R. 209] Testimony of Lewis:

"Q. Do you know of any custom or usage in the trade, the turkey industry, that checks are accepted as payment whether or not they are good checks? A. Well, it is customary when I give the farmers a check payable to the feed company and the farmer for him to in turn turn that over to the feed company as a payment on his bill, which naturally he is given the same form of credit on it as in a bank deposit. They wait until the check has cleared, I mean they don't take a check as currency anyhow whether it is in the feed business or anywhere else. *I mean the check has to be good.* (Italics ours.)

Q. The check is not considered payment unless it is good? A. Not in any line I have ever seen [188]."

From the foregoing we urge that very clearly there is no custom or usage to the effect that bad checks are accepted in payment.

The growers did not know of such a custom or usage either [see R. 222-223] Testimony of McVickers:

"Q. You are acquainted with Mr. Brooks? A. Yes.

Q. At about this time did you have any conversations with him? A. No, I didn't.

Q. Didn't he call over and get one of the checks? A. Yes, that's right.

Q. What did he say that time?

The Court: Just a minute. Prior to the sale to Geers, you had no conversation with Mr. Brooks?

The Witness: No, I didn't.

The Court: But after the sale, you did?

The Witness: Right after.

The Court: All right.

Q. (By Mr. Maury): What was said at that time by him and by you? A. Well, I received the checks back that there wasn't [204] sufficient funds there in the bank, so Brooks picked them up, and that was it.

Q. What do you mean by 'that was it'? He just took them along with him? A. That's right.

Q. What did he say he was going to do with them? A. Turn them in to Quaker Oats.

Q. How do you know there was insufficient funds in the bank at that time? A. He had picked the two checks up that I had previously sold and took them in.

Q. That was the first two checks had been sent in by you to Quaker? A. That's right.

Q. And the third one, he came out and picked it up, is that it? A. I think he did.

Q. At that time did he tell you that the first two were refused by the bank? A. That's right.

Q. What else was said, if anything? A. I just don't remember what was said then. That was the finish of the turkeys. That was the last check.

Q. Have you ever received payment for those checks? A. No, I haven't [205].

Q. Have you ever received any credit on the books of Quaker for those checks? A. Not that I know of.

Q. Has Quaker ever given you any statement showing those checks have been paid? A. No."

See also [R. 236] Testimony of McVickers:

"A. As far as that is concerned, I wouldn't say yes or no.

The Court: He can't testify to that.

The Witness: What have I got to do with this? What difference does it make whether I say this is this or this is that? Does that prove anything to me? *I haven't got the money, so why should I answer a question like that?* [220]." (Emphasis ours.)

And [R. 237] Testimony of McVickers:

"Q. (By Mr. Maury): You didn't expect to sell turkeys for bad checks, though, did you? A. No, I did not. In a way, maybe the man is innocent, I don't know, but as a general rule we try to do legitimate business. That is where your written contract comes in which has been talked about which isn't enforced to a certain extent. It is more taking it for granted that a man is good.

Q. Have you ever received your money for these birds from Mr. Geers or Mr. Couch? A. No, sir.

Q. Has Mr. Geers ever made the checks good, to your knowledge? A. Not yet, no sir."

To the same effect is the showing from the other grower [R. 241] Testimony of Ohlson:

"Q. With reference to plaintiff's Exhibits 1 and 2, the $600 check and the $1,715 check, have you ever been paid that amount of money? A. No, sir, I have not.

Q. Has it ever been credited to your account by Quaker? A. In and out. It was credited when

> I turned the check over to them and debited back to my account when the checks returned to Quaker."

We do not wish to belabor the Court unduly with an evidential analysis but we believe that the foregoing constitutes all of the evidence of the record which even remotely bears upon the proposition that there was a distinct agreement that these checks should be accepted as payment whether they turned out good or bad.

Similar situations have arisen before. In the case of *So. San Francisco Packing, etc. v. Jacobsen,* 183 Cal. 131, 19 Pac. 628, it appears that Taylor & Rosecrans in Idaho were partners engaged in the livestock business, as was Jacobsen. Jacobsen purchased three carloads of hogs from Taylor & Rosecrans to be delivered in Idaho where Jacobsen, or his agent, was to receive them and make payment *by check.* The hogs were delivered; a check for $3,490.98 was given in payment to Jacobsen's agent. Before noon of the following day it was deposited for collection with the firm's bank at Burley, Idaho. When it reached the bank on which it was drawn (in Idaho Falls) three days later, payment was refused for lack of funds. Jacobsen had no arrangement with the bank for credit or overdraft. Jacobsen disappeared. In the meantime he had shipped the hogs to the plaintiff, which in turn disposed of them in San Francisco for a price. Taylor & Rosecrans demanded the price fund from the plaintiff under a claim of ownership. About that time Western Meat Company, a creditor of Jacobsen, levied an attachment on this price fund. Judgment went for the Western Meat Company against Taylor & Rosecrans who appealed. the Court held:

"Whether or not title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case, so that the question is ordinarily one of fact for the jury, or for the court when sitting without a jury. Where, however, the facts bearing upon the question of intent are undisputed only a question of law is presented. Here the evidence shows without conflict that Jacobsen was to pay for the hogs upon delivery by check; and it is argued by the respondent that accordingly, a check having been given and received in payment for the hogs, title to the animals passed to the buyer notwithstanding that upon due presentation the check was dishonored. This argument is supported by reference to cases holding that parties may agree to accept a check or bill or note as absolute payment for goods sold in which case title to the goods will pass upon such acceptance irrespective of whether the paper is honored upon due presentation or not. We think, however, that the facts of this case do not bring it within the principle referred to, for it is quite apparent that the requirement of the vendor that a check should be given by the buyer upon the delivery of the hogs was intended as the equivalent of an insistence upon payment on delivery; in other words, that it was not a sale on credit, nor for the check as such, but that delivery of the animals and payment for them, though such payment might be made by check, were to be simultaneous, and the transaction was understood by the vendee in this sense. The legal situation thus arising can logically be no different from one where the terms of the sale are cash on delivery and a check is accepted by the vendor. In such case it is held that the acceptance of the check is no waiver of immediate payment, and although delivery is made of the

goods upon receipt of the check, title thereto does not pass as between the parties unless, upon due presentation the check is paid.

" 'A check is accepted as a particular form of cash payment, and if dishonored the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken.' (Benjamin on Sales, 7th ed., pp. 755-772.)

" 'If the sale is for cash, and the check of the buyer is taken, this will operate as no more than a conditional payment as well as a conditional delivery; and if upon due presentation of the check it is dishonored the vendor may retake possession of the goods.'[23 RCL, p. 1448.]

" 'While a delivery is perhaps the most significant fact as indicating an intention to transfer the title it is not conclusive, and notwithstanding there has been a delivery the property will not pass if it appears that such was the intention of the parties, as when payment is made a condition precedent to the passing of the property.' (35 Cyc. 308.)

" 'The title will not pass until payment if by the terms of the contract such payment is a condition precedent, or if it otherwise appears that such was the intention of the parties, unless the condition as to payment is waived.' (35 Cyc. 322.)

" 'The condition as to payment or security is one which may be waived by the seller, in which case title to the goods sold will vest in the buyer although the condition has not been performed. . . . Whether the delivery is conditional or unconditional depends primarily upon the intention of the parties as shown by all the facts and circumstances of the case, and so it is ordinarily a question of fact for the jury. If the sale is for cash the mere acceptance

of a check does not constitute absolute payment or waiver of the condition as to payment. Where the seller delivers the goods conditionally and without any intention of waiving payment or security the property does not pass; and in order to render the delivery conditional within the application of this rule it is not necessary that there should be any express declaration to that effect, but it is sufficient if it appears that such was the understanding of the parties, or that the delivery was made in the expectation of immedate payment, the question being primarily one of intention as shown by all the facts and circumstances of the case. . . . So if the seller delivers on an understanding, express or implied, that he is to receive immediate payment or security he may reclaim the goods, or if he delivers on payment by check instead of cash, and the check is dishonored, he may reclaim the property.' (35 Cyc., pp. 327-328.)

" 'In effect, this sale was for cash as distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, and as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation, was dishonored, title to the hogs remained in the seller. In Johnson etc. Co. v. Central Bank, 116 Mo. 558 [38 Am. St. Rep. 615, 22 S. W. 813], it is held that a check given for the purchase price does not constitute payment until the money is actually received by the vendor unless it is otherwise expressly agreed. In National Bank v. Chicago, etc. Ry., 44 Minn. 224, [20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560], it is held that where goods are sold for cash on delivery, and payment is made by check, such check is, in fact,

payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Such payment is only conditional or a means of obtaining the money. So, in Hodgson v. Barrett, 33 Ohio St. 63, [31 Am. Rep. 527], it is held that payment by check is a mere mode of making a cash payment; that it is conditional only, and if the check, upon due presentation, is dishonored the vendor may retake the goods from the purchaser.

"There is nothing in this record indicating that the original sellers intend to accept Jacobsen's check as absolute payment. True, they were to accept a check in payment for the hogs, but this is the usual method in cash transactions of any magnitude, and it is employed as a matter of convenience and to obviate the necessity of handling and transporting large sums of money with its attendant risks. In the case of Comptoir d'Escompte v. Bresbach, 78 Cal. 15 [20 Pac. 28], it is said that the language of the manager of the plaintiff bank in stating that a check which was subsequently dishonored, was accepted in payment of the debt sued upon should not be construed as signifying anything more the [than] provisional or conditional payment presumed by law, and is no evidence of absolute payment.

"The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchase from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the

attaching creditor is concerned it has no better right to the fund than Jacobsen himself. (Ward v. Waterman, 85 Cal. 491, 508 [24 Pac. 930].)"

A case even more closely in point is the case of *Towey v. Esser,* 133 Cal. App. 669, 24 P. 2d 835.

In that case, in reversing, the upper court made a finding from undisputed evidence which contradicted and was contrary to the findings of the Trial Court, and found that the title to the cattle at all times had remained in the seller, appellants. The upper court, based upon such modified findings, thereupon ordered the Trial Court to enter judgment in favor of the successful appellant. This action was approved by the Supreme Court of California by refusal to hear the cause. The case is additional authority for the legal proposition that

> "where personal property is sold to be paid for upon delivery by check the sale is to be treated as one for cash and, if the check is dishonored, the title to the property, as between the parties to the sale, remains in the seller who may retake the property, or if the property has been resold, claim the proceeds in the hands of the second purchaser as against an attaching creditor of the original buyer."

To the same effect is the case of *Utah Construction Co. v. Western Pacific Ry.,* 174 Cal. 156, 166, as follows:

> "The plaintiff insists that 'the giving of a check upon an insolvent bank is not a payment of the debt for which it is taken.' This may be admitted. A check is never a payment of the debt for which it is given until the check itself is paid or otherwise discharged, unless expressly agreed to be taken in payment. (More on Banks and Banking, secs. 543, 544.)"

Likewise, *Williams v. Braun,* 14 Cal. App. 396, 398, sets up the reason for the rule as follows:

> ". . . The person who is indebted to another and gives a check to his creditor does not by the mere giving of the check pay the indebtedness. A check is only a request to another to pay to the payee thereof the sum named therein out of the funds supposed to be deposited to meet such check. If the drawee does not comply with the request the fund is still there and the debtor still owes the money."

One of the latest cases along these lines in California is the case of *Mendiondo v. Greitman,* 93 Cal. App. 2d 765, 767, 209 P. 2d 817, where the Court says:

> ". . . The mere giving of a check does not constitute payment (Weger v. Rochas, 138 Cal. App. 109 [32 P. 2d 417]; Drukker v. Howe & Hawn Investment Co., 136 Cal. App. 437 [29 P. 2d 289]) nor does the mere acceptance thereof raise a presumption that such acceptance constitutes payment. . . . And since a check of itself is not payment until cashed the party attempting to prove payment by mere delivery or acceptance must go further and in addition prove that such delivery and acceptance was in accordance with an agreement that it was to be accepted as payment."

In all, the checks were dishonored by the bank; they have never been made good; the processors both agree that checks have to be good. Title does not pass unless the checks are good. We believe the learned trial judge was clearly in error when he in effect decided the case as though the checks had been honored.

(4) Caveat Emptor Applies.

The Court has dwelt much in its Memorandum Opinion, in its Findings and its Conclusions upon the failure of the plaintiff to insist upon a strict performance of the terms of an unrecorded contract requiring written permission for the growers to sell chattel mortgaged property. It has, largely upon its own volition, and upon the basis of a "usage and custom" by the Court found to exist in the turkey industry, permitted parol evidence to violate and vary the terms of written contracts for the benefit of third persons not parties to those contracts. There were several steps in each transaction. The plaintiff, lienor, did not know the turkeys were being "sold" or that they were "sold" until after it all happened. Geers and Couch gave the bad checks. We submit, no title passed to Geers and Couch. ("Bad checks are not payment," *supra.*) Thus title remained in the growers, and the lien was good between the growers and the plaintiff. Thereupon, when the hucksters resold the turkeys to the processors, they were still subject to the lien.

By the terms of the *recorded mortgages,* upon such "attempted sale," plaintiff became entitled to possession. The usage and custom set up by the Finding to pay farmers by check payable to the farmers *and* the feed company may perhaps find support in the evidence. But the additional custom which has been grafted into the Findings *i. e.,* "that the custom in the turkey business was that these checks would be accepted and were treated as cash" finds no support in the evidence whatsoever.

The processors each testified that they were not concerned as to where the title lay. At R. 171, testimony of McKibben, we find:

"Q. (By Mr. Maury): Do you have any personal recollection of these transactions [145] or any of them? A. Only that these turkeys were offered to us by John Couch.

Q. And you bought them? A. We bought them.

Q. Do you know where Mr. Couch resided at that time? A. In Riverside.

Q. Did you check any records in Riverside to determine whether there were any mortgages on these birds? A. No, I didn't, sir. It is not customary.

Q. Did you ask Mr. Couch whether the title was clear and unencumbered? A. No, I didn't.

The Court: May I ask this witness a question?

Mr. Maury: Certainly, your Honor.

The Court: Do you keep any record as to where these turkeys originate from?

The Witness: Where they originate from?

The Court: Yes. Couch came down with a bunch of turkeys and he offered them to you for sale.

The Witness: Yes, sir.

The Court: Do you know where they came from? San Diego County, Riverside County, San Bernardino County, Ventura County?

The Witness: We don't signify an individual purchase [146] as to what county it might come out of.

The Court: Have you any record to show where these turkeys came from?

The Witness: None other than our purchase record and our knowledge of the transaction.

The Court: Your Exhibit 19 says 310 young tom turkeys.

The Witness: Yes, sir.

The Court: So do you know where those turkeys came from?

The Witness: From John Couch.

The Court: Do you know where he got them?

The Witness: No, sir.

The Court: Is that true in all your invoices?

The Witness: That is true of all of them, yes.

The Court: You never asked John Couch where the turkeys came from?

The Witness: The only conversation I had with John Couch was at the particular time I bought some deliveries, he had birds that were supposed to be near the weights we needed for our requirements, and from a faint recollection they were supposed to be some toms out of Lancaster area. Other than that, there was no discussion of what town they were coming from, what grower, what milling company they were coming from."

And at R. 206-207, testimony of Lewis, we find:

"The Court: The truckers, what do you do about the truckers?

The Witness: We buy the stuff without question.

The Court: Without any inquiry at all?

The Witness: That is the general procedure, unless we are suspicious of the man.

The Court: Are you familiar with the custom in Southern California relating to the sale of poults and sale of feed to the farmers?

The Witness: Right.

The Court: What is that custom? [185]

The Witness: I would say 90 per cent of the large flocks are owned by feed companies.

The Court: Are owned by the feed companies?

The Witness: I mean through the mortgage.

The Court: You mean through the mortgaging to the feed company? They are mortgaged to the feed company?

The Witness: Right."

Thus we find that the defendant processors exercised no care whatever in the purchase of the turkeys, did nothing to ascertain whether or not the hucksters had a right to sell them, and relied upon no indicia whatsoever of ownership other than the mere possession of the hucksters, and were fully advised that "90 per cent of the flocks are owned by feed companies through the mortgage."

As was said in the heretofore cited case of *Clark v. Hamilton Diamond Co.,* 209 Cal. 1, at p. 3, 284 Pac. 915,

> "There was no other indicia of ownership than mere possession. *That was not enough.* There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell and which the real owner will not be heard to deny or question, to the prejudice of the innocent third persons dealing on the faith of such appearance." (Italics ours.)

The maxim *"Caveat emptor, qui ignorare non debuit quod jus alienum emit"* goes back to the days of the Roman law. For ready reference, its translation is:

> "Let a purchaser beware. who ought not to be ignorant that he is purchasing the rights of another.

> Let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another." (14 C. J. S., p. 57.)

A custom and usage has been invoked by the Court to vary the terms of the written agreements; to pass title on the basis of bad checks, and to protect the processors who took no pains whatsoever to ascertain that their vendors had title. If the hucksters had been outright thieves, who had actually stolen the property, the processors could not be heard to assert any claims whatsoever of title to the birds. Just where thieving ends and passing bad checks begins we do not know. The usage and custom doctrine is, we submit, insufficient in this case.

In *Leonhart v. California Wine Association,* 5 Cal. App. 19, 89 Pac. 847, the Court, citing *Withers v. Moore,* 140 Cal. 591, 74 Pac. 159, states as follows:

> ". . . 'The contract as made by the cablegrams and explained in the letter is not uncertain with respect to that point in question. It is a positive agreement by the defendant to buy the coal in question of the plaintiff at the price of twenty-four shillings and three pence per ton, to be delivered to him free of any expense of freight, insurance, exchange or duty, all of which were to be paid by the plaintiff. To attach to this contract the custom of San Francisco, the effect of which would be that if the cargo was not received until after July 1st, 1894, the defendant would pay thirty-five cents less per ton than the price agreed upon, would be to vary the terms of a written contract by parol evidence. The Code provides that evidence may be given of "usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except

as an instrument of interpretation." (Code Civ. Proc., sec. 1870, subd. 12.) And in accordance with this principle it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms. (Holloway v. McNear, 81 Cal. 156 [22 Pac. 514]; Milwaukee Co. v. Palatine Co., 128 Cal. 74 [60 Pac. 518]; Ah Tong v. Earl Fruit Co., 112 Cal. 681 [45 Pac. 7]; Burns v. Sennett, 99 Cal. 363 [33 Pac. 916]).'"

The same doctrine is set forth in *Hale Bros. v. Milliken,* 5 Cal. App. 344 at p. 366, 90 Pac. 365, where it is stated:

". . . It appears to be the settled rule in this state, and ought to be, that where the contract is certain in its terms, parol proof of a usage is inadmissible."

Conclusion.

Both judgments of the Lower Court, we respectfully urge and submit, should be reversed, and with new Findings of Fact based upon the uncontroverted evidence one new Judgment should be ordered entered in favor of the plaintiff and against all the defendants for the reasonable value of the property converted.

MAURY, LARSEN & HUNT,

By GEORGE R. MAURY,

Attorneys for Appellant.